No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1949

ROY CREEL AND ALL OTHER PLAINTIFFS LISTED IN THE COMPLAINT AND AMENDMENT TO THE COMPLAINT IN THE DISTRICT COURT IN CIVIL ACTION No. 191,

Petitioners,

vs.

LONE STAR DEFENSE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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CITATIONS

Cases:

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The Record

The record in this case is printed in two volumes. The first volume is denominated "Transcript of Record", and pages 1-233, inclusive, of this volume, comprised the only record that was printed for use in the United States Court of Appeals; pages 234-237, inclusive, of this volume, include the proceedings in the United States Court of Appeals. This volume will be referred to herein as "R". The other volume of the record is denominated "Volume II, Transcript of Record", and will be referred to as "R-II", and was printed for use in this court pursuant to a stipulation and addition to the record appearing at pages 248-250. Aside from the stipulation, this volume consists of respondent's Motion for Summary Judgment and the affidavits and exhibits

attached to and accompanying said motion. This was not printed for use in the United States Court of Appeals, but the original, in lieu of a printed copy thereof, was sent to the appellate court pursuant to petitioners' motion (R. 75-77) and an order of the trial court granting it (R. 77-78).[1] The case was heard below on the record reflected by the two volumes on file here.

The Opinions Below

The opinion of the District Court is in the form of a letter addressed to the attorneys for the respective parties dated September 23, 1947 (R. 93-95), and is not officially reported. The opinion of the United States Court of Appeals is printed in the record (R. 234-242) and reported in 171 Fed. (2d) 964.

Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1949 (R. 243), the petition for certiorari was granted on June 6, 1949 (R. 247), 69 S. Ct. 1170. The jurisdiction of this court is invoked under Title 28 U. S. C. 347 (a) and (b), now Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

Questions Presented

1. Did the coverage of the Fair Labor Standards Act extend to those who, during the recent war, were engaged in the production of munitions at Government-owned ordnance plants operated through the agency of private contractors by authority of the National Defense Act of July 2, 1940?

2. Were such persons engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act?

[1] Rule 75 (i) Rules of Civil Procedure

3. Were such persons "employees" within the meaning of the Fair Labor Standards Act?

4. Alternatively, if this court should determine that the decision of the Court of Appeals cannot be affirmed upon any of the theories within the scope of the order of this court granting the writ of certiorari, whether or not this case should be remanded to the United States Court of Appeals, Fifth Circuit, for a determination of the issue of payment pleaded by respondent and presented by it to, but not decided by the Court of Appeals.

Statutes Involved

In the interest of brevity, reference is made to Appendix A of the brief of respondent in Aaron, et al. v. Ford, Bacon & Davis, No. 79, October Term, 1949, where the pertinent statutory provisions will be found.

Statement

Petitioners have filed no brief, and their statement of the case as contained in their petition for the writ of certiorari is so barren of the controlling facts that respondent feels impelled to write a full statement; and to the extent that petitioners' statement as contained in said petition conflicts with the following, it is not accepted.

The Proceedings Below

The facts upon which petitioners based their claim are set out in their amended complaint filed February 6, 1946, in the District Court of the United States for the Eastern District of Texas, Texarkana Division (R. 3-13). In this amended complaint, petitioners allege that during the weeks beginning August 1, 1941, and ending on the date of filing their complaint, they were each employed by respondent at various times in the manufacture, production and processing of ammunition and goods for interstate

commerce (R. 9), and that after such manufacture, etc., the goods were shipped outside the State of Texas (R. 10), and that during their employmer they performed labor for respondent in excess of forty hours per week for which they have not been compensated (R. 11). They further alleged that each has a cause of action against respondent arising out of their employment for overtime wages due them under the provisions of the Fair Labor Standards Act of 1938 as amended for the amount of such overtime wages, an equal amount as liquidated damages, and attorney's fees, and that the amount due each thereunder was in excess of $1,000.00 (R. 8). Petitioners filed a Bill of Particulars (R. 24-75) pursuant to an order of the court directing them to do so (R. 22-24), after which respondent filed its answer which, so far as relevant here, consisted of a general denial (R. 15-16), and a statement that neither petitioners nor respondent was engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act (R. 16-17), and that the sums of money paid petitioners as compensation for all regular and overtime hours of work were greater in amount and in excess of the amount respondent would have been required to pay them under and as computed by the requirements of the Fair Labor Standards Act, even if such Act had been applicable (R. 16). Prior to the time respondent's answer was filed, respondent had been instructed by the Department of Justice not to present in its pleadings the defense that the respondent enjoys sovereign immunity as an agent of the United States. However, the defense was presented to the trial court in argument supporting respondent's Motion for Summary Judgment (R. 182-184). Respondent also presented the defense in argument in support of its Motion for Summary Judgment that the transportation of government-owned munitions of war across State

lines was an administrative act of the Government in its sovereign capacity and not commerce (R. 184), and the applicability of the Walsh-Healey Act, to the exclusion of the Fair Labor Standards Act, was likewise mentioned in argument (R. 212).

Respondent filed its Motion for Summary Judgment (R. 2-250), and the following grounds, among others not relevant here, were presented:

> "(a) Plaintiffs were not engaged in commerce, nor in the production of goods for commerce, within the meaning and intendment of the Fair Labor Standards Act, while they were in the employ of the defendant."
>
> "(b) Defendant was not engaged in commerce, nor in the production of goods for commerce, within the meaning and intendment of the Fair Labor Standards Act, during the time plaintiffs were employed by it."
>
> "(c) Defendant has paid all plaintiffs all moneys which it owed them, and each of them, for the services performed by them, and each of them, for the defendant, in accordance with their contracts of hire, and all laws, statutes and lawful regulations issued pursuant thereto, as applied to all plaintiffs and their employment with defendant, and the sums of money paid said plaintiffs, each respectively, by defendant, were sums equal to, or greater in amount, and in excess of the sums of money which this defendant would have been required to pay plaintiffs, each respectively, and which they would have been entitled to receive, computed in accordance with the provisions of the Fair Labor Standards Act, had said Act been applicable to defendant, and plaintiffs' employment with defendant." (R-II, 251).

Attached to and supporting the Motion for Summary Judgment were the affidavits of the Contracting Officer's Representative, the Government's Field Auditor, and various officials and employees of respondent, each having

personal knowledge of the facts sworn to by him, and being able to give competent testimony of the truth thereof (R-II, 252-285), and there was attached to this motion, as Exhibit "A", the Management Service Contract W-ORD-516, DA-W-ORD-3, entered into between respondent and the Government (R-II, 285-340), and the supplements to the contract (R-II, 340-425). Subsequently, and before a hearing on the Summary Judgment, respondent, with leave of the court, filed a supplemental affidavit in support of its motion for Summary Judgment (R. 79-87). The original and supplemental affidavits and the exhibits attached to and supporting the Motion established the facts set forth in the next section of this brief, captioned "The Facts".

A hearing was had on respondent's Motion for Summary Judgment in the District Court, which, after considering "the pleadings in the action, defendant's said Motion for Summary Judgment, and the affidavits of John T. Murchison, William A. Bailey, A. Kelly, J. S. Herbert, K. M. Prichard, K. E. Huffman, A. C. Sprague, R. W. Ells and C. E. Jones, accompanying and in support of said Motion for Summary Judgment, and there being no controverting or opposing affidavit, or other evidence in opposition to defendant's Motion for Summary Judgment and said accompanying affidavit; and the court having found that there is no genuine or material issue or controversial question of fact to be submitted to the court on the trial of this cause", granted respondent's motion and entered summary judgment thereon, directing that the cause be dismissed (R. 95-96). The trial court based its judgment primarily upon the conclusion that the activities conducted at the Lone Star Ordnance Plant did not amount to the production of goods for commerce within the meaning of the Fair Labor Standards Act (R. 93).

Petitioners appealed from this judgment to the United States Court of Appeals, Fifth Circuit, and after argument there, the Court of Appeals, in an opinion by Judge Holmes, affirmed the judgment of the trial court, holding (a) that the facts set forth in the affidavits and exhibits accompanying respondent's Motion for Summary Judgment were not controverted either by opposing affidavits or testimony; and (b) that respondent was not an independent contractor, but instead was "acting merely as a Government agency." (R. 334-242).

The Facts

The facts are as follows:

1. Respondent was incorporated under the laws of Ohio in 1941 for the sole purpose of fulfilling and performing Contract W-ORD-516, DA-W-ORD-3, as amended, to avail the Government of the key personnel, industrial organization, mass production "know-how", and industrial technique of The B. F. Goodrich Company, the services of which, along with other large manufacturing concerns, representatives of the United States Ordnance Department stated, in conference with Goodrich officials, were essential to the War Department's vast plans for national security (R-II, 254-255).

2. The respondent, pursuant to the contract referred to in the next preceding paragraph, and under the direction of the United States Government, designed, constructed, equipped and staffed the Lone Star Ordnance Plant, a new ordnance facility, upon a Government reservation comprising approximately twenty-two thousand acres, and trained key personnel to operate this facility for the loading of fixed rounds, shells, bombs, boosters, fuses, detonators, artillery primers, and other similar ordnance items for use by the Government in the prosecution of the late

war (Paragraphs 1-4, original affidavit supporting Motion for Summary Judgment, R-II, 254-255).

3. The United States, by written contract (R-II, 285-328) retained respondent to recruit labor and other personnel for, and to manage the operation of, the ordnance plant. Respondent was paid a fixed fee for this service, and all costs of operation, including the cost of labor and materials, which costs exceeded ten thousand dollars, were at the Government's expense (R-II, 255 and 285). At all times involved, the premises upon which petitioners were employed, the tools and equipment furnished or supplied to them by respondent which they, and all others working on the premises were using in their employment, and the property and products with which they dealt in such employment, were all in their entirety the property of the United States (Paragraphs 3 and 5, original affidavit supporting Motion for Summary Judgment, R-II, 255-256).

4. By the terms of the Contract, the title to all materials, tools, machinery, equipment, supplies, and all other property of, upon, located at, and used by the Plant, including all parts, components, explosives and materials from which respondent assembled munitions under its Contract, was in the United States Government, and title to all items purchased by respondent immediately vested in the Government at the point of shipment (Paragraph 5, original affidavit supporting Motion for Summary Judgment, R-II, 256).

5. Under the Contract, the Government furnished, supplied, and caused to be shipped to the Plant, all parts, components, explosives and materials used in the assembling and loading of ammunition, except such small quantities of small metal parts (inconsequential in amount) as the Contracting Officer from time to time directed respondent

to furnish, and under said Contract, the title to such Plant-purchased material immediately vested in the Government at the point of shipment (Paragraph 26, original affidavit in support of Motion for Summary Judgment, R-II, 263).

6. Respondent did not ship finished ammunition from the Plant; all such shipments were made by the Ordnance Department, on Government bills of lading (Paragraph 36, original affidavit supporting Motion for Summary Judgment, R-II, 268).

7. Respondent at no time had title to the finished products of the Plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control (Paragraph 1, supplemental affidavit supporting Motion for Summary Judgment, R. 79-80).

8. The Government did not purchase munitions from the respondent (Paragraph 2, supplemental affidavit supporting Motion for Summary Judgment, R. 80).

9. Respondent did not sell munitions to the Government, or to any other party (Paragraph 3, supplemental affidavit supporting Motion for Summary Judgment, R. 80).

10. No munitions or other products were manufactured or processed at the Ordnance Plant except from materials belonging to the Government, and all such munitions and other products were by the Government used in the prosecution of the war (Paragraph 4, supplemental affidavit supporting Motion for Summary Judgment, R. 80).

11. The United States furnished and shipped to the Ordnance Plant approximately 90-95 percent of all materials, supplies, machinery, equipment, and other property

used in connection with the Management Service Contract for the operation of such Plant. The remainder (approximately five percent) of the materials, supplies, etc., were purchased by respondent. The bulk of all such purchases (approximately ninety-five percent of the purchased material) was approved by the Government prior to the issuance of a purchase order by respondent. Title to such purchased materials vested in the United States at their points of origin, and such materials were shipped to the Ordnance Plant on Government bills of lading marked "Government property for Military Use". The remainder of the materials purchased by respondent which were not shipped on Government bill of lading, consisted of less than car lot shipments and purchases in an amount less than Five Hundred Dollars; title to these purchases, however, also vested in the United States (Paragraph 5, supplemental affidavit supporting Motion for Summary Judgment, R. 80-81).

12. A Government Finance Officer in Washington, D. C. paid the freight on the Government bills of lading (Paragraph 6, supplemental affidavit Motion for Summary Judgment, R. 81).

13. The United States maintained an Accountable Property Officer to be accountable for all property used in connection with the contract between the Government and the respondent (Paragraph 8, supplemental affidavit Motion for Summary Judgment, R. 81).

14. Prior to the time the Plant actually began operations, the United States advanced to respondent a large sum of money to defray anticipated operating expenses. As money was withdrawn from this fund, it was replenished by the Government. Respondent was not required to use any of its own money in the operation of Lone Star

Ordnance Plant (Paragraph 9, supplemental affidavit Motion for Summary Judgment, R. 81-82)

15. The Government contracted for electric power, gas, telephone, telegraph and teletype service at the Plant, and paid such bills directly. Respondent acted as an agent of the Government for the purpose of causing official business messages to be transmitted (Paragraph 10, supplemental affidavit Motion for Summary Judgment, R. 82).

16. In the operation of the Plant, the Ordnance Department specified the various items which it desired to have loaded and supplied production schedules which set forth the quantities of the various items that it desired loaded each month. The quantities specified in the production schedules were revised by the Ordnance Department from month to month, and it was a frequent and common occurrence that the schedule would be increased or decreased in the month, due to the fluidity of the war and resulting demand for different ordnance items, or for larger or smaller quantities of particular items. During the operation of the Plant, the indicated quantities of the particular ammunition items were loaded in the Plant's various load lines (Paragraph 29A, affidavit in support of Motion for Summary Judgment, R-II, 264)

17. The Plant was under the control and supervision of the Chief of Ordnance, United States Army. A commanding Officer appointed by the Chief of Ordnance was on duty at Lone Star Ordnance Plant at all times relevant hereto, and had complete control over the property and the installations thereon (Paragraph 11, supplemental affidavit Motion for Summary Judgment, R. 82)

18. By deed, Honorable Coke Stevenson, as Governor of the State of Texas, ceded jurisdiction over the Lone Star reservation to United States Government for all pur-

poses except the service of civil process upon respondent, and the United States Government had exclusive jurisdiction over the premises embracing the Lone Star Ordnance Plant (Paragraph 12, supplemental affidavit Motion for Summary Judgment, R. 82).

19. The Government retained the right to dismiss any employee at the Plant which the Contracting Officer should deem incompetent or whose retention was by him deemed not to be in the public interest (Paragraph 13, supplemental affidavit Motion for Summary Judgment, R. 82-83).

20. The Government approved all wage and salary rates. The Government also required that no key employees and their principal assistants be hired or assigned to service until there had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications and experience of the persons selected for such assignment (Paragraph 14, supplemental affidavit Motion for Summary Judgment, R. 83).

21. All munitions processed at the Plant were processed under the direct supervision and control of the Government (Paragraph 15, supplemental affidavit Motion for Summary Judgment, R. 83).

22. The Government specified the loading processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during the various steps of their processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Respondent was required to comply with such rules and regulations and to meet specifications, and Government officers and employees were present to report on compliance (Paragraph 16, supplemental affidavit Motion for Summary Judgment, R. 83).

The Government, from time to time, sent to respondent production schedules directing respondent to produce munitions of certain designated specifications. Respondent was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and respondent produced no munitions except as required by Government directive. (Paragraph 17, supplemental affidavit Motion for Summary Judgment, R. 83-84).

23. On occasions the Government transferred production schedules from other ordnance plants to the Lone Star Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, respondent was required to take over such supply contracts and to pay the vendors in accordance therewith from funds supplied to respondent by the Government (Paragraph 18, supplemental affidavit Motion for Summary Judgment, R. 84).

24. Respondent was not penalized if the materials processed at the Plant did not meet specifications and could not be used. Under the Contract between respondent and the Government, respondent was allowed all costs of reworking rejected munitions and all costs of material finally rejected (Paragraph 19, supplemental affidavit Motion for Summary Judgment, R. 84).

25. Of the direct materials used in the manufacture of munitions, the Government furnished materials of the approximate value of $503,393,000.00. Respondent purchased and paid for with Government money materials of the approximate value of $32,514,139.66. (Paragraph 20, supplemental affidavit Motion for Summary Judgment, R. 84).

26. Government employees employed by the Ordnance Department audited respondent's time cards and payrolls,

and during a part of the time, witnessed the actual payments to respondent's employees, and during the remainder of the time, witnessed actual payments to a sufficient number of the employees to satisfy the Government that their actual payments were being made, as indicated by respondent's payroll records (Paragraph 21, supplemental affidavit Motion for Summary Judgment, R. 85).

27. Respondent paid wages and salaries of employees by check against a bank account, the funds of which were furnished by the Government, and were subject to withdrawal by the Government (Paragraph 22, supplemental affidavit Motion for Summary Judgment, R. 85).

28. No sales tax was paid by respondent on materials purchased for use at Lone Star Ordnance Plant, no ad valorem taxes on real or personal property at Lone Star Ordnance Plant was paid to the State or the County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the Plant (Paragraph 23, supplemental affidavit Motion for Summary Judgment, R. 84).

29. Under Article VII-B of the Management Service Contract under which respondent operated the Lone Star Ordnance Plant, provision was made for changes in it, the work to be performed, and the method for effecting such changes, following which was the following conclusion:

> "* * * but nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed." (R-II, 318).

30. Article VII-E (4) of such contract provided that the Government should prescribe procedures to be followed by the Contractor in accounting, checking and auditing functions, and that "* * * if in the opinion of the Contract-

ing Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary" (R-II, 320).

31. Article VII-F (7) of such contract provides that the Contractor shall "at all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government" (R-II, 321).

32. By Change Order No. 4, dated July 9, 1943, Section 4, of Article V-A, of Title 5, was changed to give the Government the right to pay directly to the persons concerned all sums due from the Contractor for labor, material, or other charges, which was reaffirmed by and incorporated in Supplement 8 to the Contract (R-II, 343).

33. By Change Order No. 7, dated October 12, 1943, respondent was directed to perform, at the Navajo Ordnance Depot, Bellemont, Arizona, all work necessary or incident to the reworking and renovating of certain ammunition, and these provisions were reaffirmed by and incorporated in Supplement 8 to the Contract (R-II, 347-348).

34. By Change Order No. 9, dated April 3, 1944, and Change Order No. 10, dated April 7, 1944, the terms of both of which were included in Supplement 11 dated June 30, 1944, it was provided that the Contractor "Shall, as directed, from time to time by the Contracting Officer, receive, inspect (including x-raying), assort, screen, segregate, load, renovate, recondition, rehabilitate * * * any ammunition (including components and containers), even though it is not specifically mentioned in this contract, *regardless of its origin*, in such quantities as may be directed by the Contracting Officer" (R-II, 368-369).

35. There were four phases of work to be performed under the Management Service Contract. The provisions

of the contract applicable to the operation of the Plant are found under Titles IV to VII, inclusive, and it is with these, and these only, that we are concerned in the present case.[2]

36. The Government reserved the right to have the final decision on all disputes concerning questions of fact arising under the contract (R-II, 323).

37. The claims of all petitioners all originated subsequent to the construction of the Plant, and during the time it was being operated.

Subsection 1, of Article VI-A, of Title VI, of the Management Service Contract, provides that "The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice. * * * Upon receipt of such notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work * * *" (R-II, 315-316).

Notice of termination of work under such Contract was given on behalf of the Government "for the convenience of the Government" by the Contracting Officer for the Chief of Ordnance on October 18, 1945, to be effective midnight October 6, 1945 (R-II, 401).

The substance of these facts was found by the Court of Appeals (R. 235-238).

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[2] It should be emphasized that Titles I through III, inclusive, have no bearing on the present case. Thus the provisions of Title I-E, by their express terms, are limited to the work done under that particular Title; that is to say, to the work of design, engineering and construction (R-II, 292-295); similarly the provisions of Article II-D and III-D have application only to work done in connection with the procurement of production equipment and the training of key personnel necessary for the operation of the Plant (R-II, 295-297).

Summary of the Argument

I.

The record here adequately presents the issues. The facts recited in the next preceding section of this brief were based upon extensive affidavits which were not controverted. The legal issues were argued and presented to the trial court; and they were argued and considered by the Court of Appeals in the light of *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948).

II.

In the interest of brevity this respondent adopts point II of the Summary of Argument which will be found at p. 21 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

III.

In the interest of brevity this respondent adopts point III of the Summary of Argument which will be found at p. 21 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

IV.

In the interest of brevity this respondent adopts point IV of the Summary of Argument which will be found at p. 22 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

V.

In the interest of brevity this respondent adopts point V of the Summary of Argument which will be found at p 23 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

VI.

Respondent having paid petitioners base and overtime compensation under the Walsh-Healey Act a sum greater than if computed under the terms of the Fair Labor Standards Act, petitioners have received full payment and are not entitled to recover in this suit.

Argument

I.

THE RECORD ADEQUATELY PRESENTS THE ISSUES

Kennedy v. Silas Mason Co., 334 U. S. 249 (1948) came to this court under peculiar circumstances. The respondent in that case had filed a motion for summary judgment supported by a single affidavit only two printed pages in length. Aside from the motion and its supporting affidavit, the record consisted merely of the contract between the respondent and the government and the opinion of the lower courts. The record was wholly barren of any findings of fact. Moreover, in the Court of Appeals and again in this court, issues were argued which had not been considered below. For all of these reasons, this court declined on that record to pass on the questions sought to be presented.

The present case is wholly different. It is true that the grounds stated in support of respondent's Motion for Summary Judgment in the trial court made no reference to the National Defense Act of July 2, 1940, or to the Walsh-Healey Act, but in argument on respondent's Motion for Summary Judgment before the trial court, petitioners' counsel made the argument that the contract applied the Fair Labor Standards Act to the operation of the plant, and in the course of his argument read from that part of the contract applying the Walsh-Healey Act to respondent's operations, and respondent's counsel at that time called the trial court's

attention to the fact that it was the Walsh-Healey Act, and not the Fair Labor Standards Act, to which petitioners' counsel had reference, and to that extent, the application of the Walsh-Healey Act to respondent's operations was called to the attention of the trial court (R. 212). However that may be, the contention was made by respondent in the Court of Appeals that the Lone Star Ordnance Plant was operated by the Government through the agency of respondent pursuant to the Act of July 2, 1940, and that this Act, together with the Walsh-Healey Act, rather than the Fair Labor Standards Act, governed labor standards in respondent's operations.[3] Moreover, the Motion for Summary Judgment was supported by voluminous and informative affidavits of the Contracting Officer's Representative, the Ordnance Department's Field Auditor, and various officials and department heads of respondent, all of whom had personal knowledge of and were competent to give testimony to the truth of the facts sworn to by them (R-II, 253-285 and R. 79-87), and none of these facts were controverted by petitioners,[4] and these findings cover every aspect of

[3] Point IV of "Defendant's Contentions" was summarized in its brief filed in the Court of Appeals on page 7 as follows:

"The Lone Star Plant was operated by the Government through the agency of the defendant under a contract entered into pursuant to the Act of July 2, 1940 (c. 508, 54 Stat. 712), which Act, together with the related Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. Secs. 35-45), rather than the Fair Labor Standards Act, fixed and determined the labor standards, hours of work, and overtime compensation for plaintiff-type employees."

[4] Under Rule 56 (e), Federal Rules of Civil Procedure, petitioners were required to serve opposing affidavits prior to the hearing on the Motion for Summary Judgment, and when, as in this case, they failed to do so, the facts stated in the affidavits supporting respondent's Motion for Summary Judgment were taken as confessed. The Court of Appeals rendered its decision in this case, having fully in mind the decision of this court in *Kennedy v. Silas Mason Company*, supra

the case and afford a solid basis to dispose of all of the issues presented by this appeal. Moreover, Judge Lemley's opinion in the case of *Barksdale v. Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark., 1947) was handed down a very short time before a hearing in the trial court on respondent's Motion for Summary Judgment in this case; the opinion was presented to the trial court (R. 186) as controlling here; and in view of the identity of the uncontroverted facts involved

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The so-called response to the Motion for Summary Judgment was signed but not sworn to by petitioners' counsel, and it does not appear that they have personal knowledge of the facts set up in such response, nor that they were competent to give testimony as to the truth thereof. Vol. 3, Moore's Federal Practice, Page 3174, stating:

> "The Summary Judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue of fact although *such issue is raised by the formal pleadings*. The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial, so that only the latter may subject a suitor to the burden of a trial. To attain this end, the rule permits a party to *pierce the allegations of fact in the pleadings* and to obtain relief by a summary judgment where facts set forth in detail in affidavits, depositions and admissions on file show that there is no genuine issue of fact to be tried." (Emphasis supplied)

was approved by the Court of Appeals, Fifth Circuit, in *Wilkinson v. Powell, et al.*, 149 F. (2d) 335 (5 Cir., 1945); see also *Fletcher v. Krise* (D. C. Cir. 1941) 120 F. (2d) 809; *Geller v. Trans-American Corp.*, 53 F. Supp. 625 (D. Del., 1943) affirmed by Per Curiam Opinion expressly approving the reasoning and conclusions of the District Court, 151 Fed. (2d) 534 (3 Cir., 1945). A similar unverified reply to a motion for summary judgment supported by affidavits was held insufficient to controvert the facts stated in the supporting affidavit in *Board of Public Instruction v. Meredith*, 119 F. (2d) 712 (5 Cir., 1941) (certiorari denied 323 U. S. 774); see also *National War Labor Board v. Montgomery, Ward & Company*, 144 F. (2d) 528 (D. C. Cir. 1944). Of interest is the statement of Judge Walker in *Engel v. Aetna Life Ins. Co.*, 139 Fed. (2d) 469 (2 Cir., 1943): "We have often held that mere formal denial or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment".

in the two cases, the trial court approved the conclusions reached and necessarily, by inference, found that there was no material difference between the uncontradicted facts involved in the two cases. Indeed, the trial court (R. 94) quoted certain of the facts and conclusions embodied in Judge Lemley's opinion (70 F. Supp. 693-694). All these and others were by brief and argument presented to and considered by the Court of Appeals; the Court of Appeals, in writing the opinion in the case at bar, meticulously pointed out that the record in this case supplied the deficiencies found by this court to exist in the record in *Kennedy v. Silas-Mason Company* and, in fact, at pages 237-238 of the record, enumerated extensive statements of fact not in the former record, but in the present record, and upon which the summary judgment of the trial court in the case at bar was affirmed.

II

The National Defense Act Set Up a Wholly New System of War Production Which Was Completely Outside the Scope of the Fair Labor Standards Act

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 25-44 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis*.

It will be noted that every fact referred to in the argument contained in respondent's brief in the *Aaron* case which we have by this paragraph adopted as respondent's argument under this point, is not only supported by the uncontroverted affidavits and exhibits supporting the Motion for Summary Judgment in this case, but is also specifically found by the United States Court of Appeals in the case at bar (R. 235-241).

III.

The Walsh-Healey Act Applied to Employers of the Arkansas Ordnance Plant to the Exclusions of the Fair Labor Standards Act

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 44-61 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis.*[4]

IV.

The Petitioners Were Not Engaged in the Production of Goods for Commerce

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 61-80 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis.*[5]

V.

The Petitioners Were Employees of the United States

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 80-93 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis.*[6]

VI.

Petitioners Were Paid in Full

This proposition is urged for consideration of this court only in the event it should determine that the decision of the Court of Appeals should not be affirmed upon any of the theories within the scope of the order of this court granting the writ of certiorari, in which event respondent

[4] See footnote 5 at page 21 of this brief.
[5] See footnote 5 at page 21 of this brief.
[6] See footnote 5 at page 21 of this brief.

presents that the case should be remanded to the Court of Appeals for a consideration and determination of respondent's plea of payment, a complete defense within itself, even under the terms of the Fair Labor Standards Act.

One defense presented in the answer and the Motion for Summary Judgment was that the sums of money paid to petitioners as compensation for all regular and overtime hours of work performed by them, each respectively, fully satisfied the requirements of the Fair Labor Standards Act, even if it could be held applicable, and in fact were greater in amount and in excess of the amount respondent would have been required to have paid them under and as computed by such Act (R. 16)." This defense was carried forward in respondent's Motion for Summary Judgment (Subdivision (c) of Par. 1, R-II, 251).

In petitioners' amended complaint on which they went to trial, they alleged in part "that neither they nor any of them have a complete record of the work and labor performed by them while employed by defendant; that defendant has an accurate and complete record of each and every hour worked by plaintiff, and by each employee, and the wages paid". (Par. 7, Plaintiff's Amended Complaint, R. 11-12)

That the aggregate of petitioners' wages for an administrative work week exceeded what the aggregate would have been had such wages been computed in accordance with the Fair Labor Standards Act, is explained by the fact that respondent, under its contract with the Government, was required to and did pay them under the provisions of the Walsh-Healey Act, which provided greater benefits in requiring the payment of a minimum of time and a half for all hours in excess of eight in one day, as also the payment of the same overtime rate for all hours in excess of forty in one week; moreover, following and pursuant to Executive Order 9240 (7 FR 7159), double time was paid to an employee working on the seventh consecutive day during the same administrative work week.

Mr. C. M. Kennedy, speaking as attorney for petitioners at one of the pre-trial conferences held in the trial court, admitted that respondent had kept an accurate record of the number of hours each petitioner worked each day during each administrative work week, his basic wage rate, any change in his basic wage rate, and the amount respondent paid petitioner for each administrative work week during the course of his employment (R. 120-122, and R. 140-141).

Petitioners having thus agreed that respondent's time-keeping and pay-roll records were correct as to time worked and wages paid, respondent presented with its Motion for Summary Judgment to sustain this particular ground of the motion, the affidavits of K. R. Huffman, Respondent's Comptroller and Assistant Treasurer, and William A. Bailey, Civilian Ordnance Department employee of the United States Government, working at this plant in the capacity of Field Auditor, which state that according to these records, each petitioner was paid at his regular base rate for the first forty hours during each and every work week, and time and a half for all hours in excess of forty. (Par. 46, Affidavit in Support of Motion for Summary Judgment, R. 276-279). The record in this case is further undisputed that these time-keeping and pay-roll procedures and records were standardized, and were submitted to and approved by the Government, were continuously audited and inspected by the Government Auditor and time checkers who, among other things, verified the amount of time worked by petitioners. (Par. 32, Affidavit in support of Motion for Summary Judgment, R-II, 266 and Paragraphs 34 and 35 of the Affidavit, R-II, 267-268).

In spite of the indefinite allegations of petitioners' complaint with respect to what each petitioner was suing for, and the particulars upon which each claim was based, they in one of the pre-trial conferences in the trial court com-

mitted themselves to the proposition that their claim was that the employees were on the premises eight and one-half hours and were paid for only eight hours of each work day. Mr. Kennedy, speaking for petitioners in this case, therefore stated that they were suing for thirty minutes overtime for each day each petitioner worked. R. 141. In other words, there were eight and one-half hours time elapsed from the beginning to the ending of their work day, and here again full payment is established, because thirty minutes of the eight and one-half hours elapsed time was consumed by petitioners in a scheduled lunch period which they were free to use as they chose, and enjoyed daily by each of them. Par. 22-A and 22-B, Affidavit in support of Motion for Summary Judgment, R. II, 261-262, leaving eight hours elapsed working or productive time for which each petitioner was, according to their own admissions in their pleadings and in the pre-trial conferences, fully paid in accordance with even the Fair Labor Standards Act. There were, of course, a few departments in which it was impracticable to assign a regular thirty minute lunch period, but in these instances, petitioners were permitted to eat their lunch on what was called a "snatch lunch" basis, that is, whenever they had free time to do so, and no deduction was made for a lunch period

It is interesting to note the statement of one of petitioners' attorneys in one of the pre-trial conferences where he said: "There is only one issue and that is employees engage in production work on company time. And that is the sole question in the law suits before Your Honor. * * * That condition is solely on the productive time. That is the only contention we make." R. 107-108. At this time the Court said: "Is the issue [illegible] at this stage now. As I understand your statement, speaking for all these plaintiffs in these suits that you are making no claim about walking time or dressing time or sleeping time or any other time except the individual man where engaged in actual productive [illegible]." Counsel replied: "That is correct, Your Honor."

with respect to petitioners in those departments. They were paid for all elapsed time, whatever it was, between actually going to work at the beginning of their shift, to the end of their shift. (Par. 22-A, Affidavit in support of Motion for Summary Judgment, R-II, 261-262).

Such of the petitioners as were paid upon a salary basis were not required to ring time clocks, but reported to their supervisor at their assigned work place. At the end of each work week, a "Salary Employee's Weekly Attendance Report", setting forth the number of hours worked each day, together with the total number of hours worked during that particular administrative work week, was presented to the employee, and if found by him to be correct, signed by him, and he was paid in full at proper base and overtime rates, if overtime rates were applicable to him, for all hours shown on said signed weekly attendance reports. (Par. 24, Affidavit in Support of Motion for Summary Judgment, R-II, 263).

In every instance where the question has been raised, the courts have held that the time consumed by an employee during a scheduled lunch period is not considered as working time, and is not compensable where, as in this case, the employee is free to spend such lunch period in any manner he desires. *Armour & Co. v. Wantock*, 323 U. S. 126 (1944); *Fox v. Summit King Mines, Ltd.*, 143 F. (2) 926 (9 Cir., 1944); *Schnapp v. Groceries Terminal Warehouse Co.*, 13 Labor Cases (C. C. H.) 63,875 (N. D. Ill., 1947); *Connell v. Delaware Air Craft Industries, Inc.* 13 Labor Cases (C. C. H.) 63,932 (Del. Supr. Ct., 1947); and this is true even though the employees choose to remain on the premises of the employer as a matter of convenience to themselves. *Thomas v. Peerless Carbon Co.*, 62 Fed. Supp. 154 (N. D. Tex., 1945).

Briefly summarized, petitioners' claims are based upon the fact that eight and one-half hours time elapsed between the beginning and ending of their day's shift. They admit that for eight of the eight and one-half hours of each day, they were paid compensation at least equal in amount to base and overtime wages, computed in accordance with the Fair Labor Standards Act; the other thirty minutes was consumed by them in a non-compensable scheduled lunch period, as to those who enjoyed a scheduled lunch period, and as to those who did not have a scheduled lunch period, the facts are likewise uncontroverted that they were paid in full for the entire eight and one-half hour period.

In all events, according to the uncontroverted facts, all petitioners, whatever their class or schedule of work, were paid in full.

Conclusion

It is therefore respectfully submitted that the decision of the court below should be affirmed on the ground that the activities of petitioners were not within the coverage of the Fair Labor Standards Act. If the decision should not be affirmed, however, the case should be remanded for consideration of other defenses.

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